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**FEDERAL ELECTION COMMISSION**  
999 E Street, N.W.  
Washington, D.C. 20463  
**FIRST GENERAL COUNSEL'S REPORT**

**SENSITIVE**

MUR: 5421  
DATE COMPLAINT FILED: March 4, 2004  
DATE OF NOTIFICATION: March 9, 2004  
DATE ACTIVATED: July 7, 2004

EXPIRATION OF STATUTE December 19, 2008  
OF LIMITATIONS:

**COMPLAINANT:**

Thomas J. Fitton, Judicial Watch, Inc.

**RESPONDENTS:**

John Kerry for President, Inc. and Robert Farmer, in  
his official capacity as treasurer  
Teresa F. Heinz Kerry  
Mellon Trust of New England, N.A.

**RELEVANT STATUTES AND  
REGULATIONS:**

2 U.S.C. § 431(8)(B)(vii)  
2 U.S.C. § 431(26)  
2 U.S.C. § 432(e)(2)  
2 U.S.C. § 434(b)  
2 U.S.C. § 441a(a)(1)(A)  
2 U.S.C. § 441a(f)  
2 U.S.C. § 441b  
11 C.F.R. § 100.33(a) and (c)  
11 C.F.R. § 100.52(b)(4)  
11 C.F.R. § 100.82(a) and (e)(1)(i)  
11 C.F.R. § 104.3(d)(4)  
11 C.F.R. § 110.10

**INTERNAL REPORTS CHECKED:**

FEC Disclosure Reports

**FEDERAL AGENCIES CHECKED:**

None

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**I. INTRODUCTION**

This matter concerns bank loans obtained by 2004 Democratic presidential candidate Senator John Kerry in December 2003, most of the proceeds of which he in turn loaned to his presidential primary committee, John Kerry for President, Inc. ("the Committee"). The complainant alleges that the Committee may have accepted, and the Senator's spouse Teresa Heinz Kerry may have made, an unreported and excessive contribution "to the extent that [Mrs. Heinz Kerry's] property rights in the Kerry family home or any other jointly-held property are pledged as collateral for any or all of the secured loans received by the Committee." Complaint at 1.

As discussed below, publicly available property records raise the possibility that a senior lien on collateral property securing a \$6.4 million loan Senator Kerry obtained in connection with his campaign may have caused his share of the collateral property to be less than the amount of the loan, thereby triggering a possible excessive contribution by Mrs. Heinz Kerry. Moreover, based on the operation of Massachusetts law governing tenants by the entirety, the available information raises a question as to whether Mellon Trust made the \$6.4 million loan to Senator Kerry on a basis that assures repayment, triggering possible violations of 2 U.S.C. § 441b by the Committee and Mellon Trust. In order to obtain the facts necessary to analyze these issues further, we recommend the Commission find reason to believe that Teresa Heinz Kerry made and the Committee accepted an excessive contribution and that Mellon Trust made and the Committee accepted a prohibited contribution which it did not properly report.

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I. II. **FACTUAL AND LEGAL ANALYSIS**

A. **Factual Background**

On December 18, 2003 Senator John Kerry announced that he was loaning \$850,000 to his presidential primary campaign and was seeking a mortgage on his personal residence to obtain additional campaign funds. Thomas B. Edsall, *Kerry Mortgages Home to Keep Campaign Afloat; Fundraising Falling Short for Presidential Hopeful as Primaries Demand Increased Spending*, The Washington Post, December 19, 2003, available at 2003 WL 67894691. At the time, Senator Kerry was facing strong opposition in the first two Democratic primaries -- the January 19, 2004 Iowa caucuses and the January 27, 2004 New Hampshire primary -- and was reportedly running low on funds to meet the increased staff, travel, and advertising demands leading up to them. *Id.*; Sharon Theimer, *Kerry Taps His Own Fortune*, The Deseret News, December 19, 2003 at A10, available at LEXIS, News & Business Database; and Patrick Healy, *Kerry Mortgage to Help Fund Race*, The Boston Globe, December 19, 2003 at A1, available at 2003 WL 66483547.

The Committee's disclosure reports reflect that Kerry in fact loaned his campaign \$1.1 million in the form of proceeds from a series of three "smaller" loans between December 12 and December 19, 2003 as he was seeking a larger mortgage loan on his personal residence. According to the Schedule C-1s contained in the Committee's January 2003 Year End Report, as amended, the loans comprising the \$1.1 million derived from lines of credit at two banks, Mellon Bank, N.A and Citizen's Bank. The Mellon Bank loans, \$500,000 received on December 12, 2003 and \$250,000 received on December 19, 2003, were reported as draws from an unsecured credit line. The third loan, \$350,000 received on December 15, 2003, was reported as a draw on a home equity line of credit from Citizen's Bank that was secured by the Senator's residence, a

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1 town home located in the Beacon Hill area of Boston. The property owners of record for the  
2 residence are Linda K. Smith and Mellon Bank, N.A., Trustees of the T & J Louisburg Square  
3 Nominee Trust. Response of Teresa Heinz Kerry. Senator Kerry and Mrs. Heinz Kerry are the  
4 beneficiaries of the trust as tenants by the entireties. *Id.* and Response of the Committee at 2.

5 Senator Kerry soon obtained the fourth and larger loan he was seeking from Mellon Trust  
6 of New England, N.A. ("Mellon Trust"), a \$6.4 million loan secured by another mortgage on the  
7 Boston town home residence (alternatively referred to as "the collateral property") on  
8 December 19, 2003, and on or about December 23, 2003, he officially announced that he  
9 borrowed those funds to lend to his campaign. Thomas B. Edsall, *Kerry Lends Campaign \$6.4*  
10 *Million; House Mortgaged as Funds Dwindle*, The Washington Post, A Section, December 24,  
11 2003, available at 2003 WL 67895772. According to the Committee's disclosure reports,  
12 Senator Kerry used the proceeds of the \$6.4 million loan to pay off the previous three credit-line  
13 draws, apparently including interest on one or more of the loans, and loaned the Committee  
14 \$1,787,965.80 on December 24, 2003.<sup>1</sup> On January 5, 2004, he loaned the Committee an  
15 additional \$3.4 million from the proceeds of the mortgage loan. Finally, on January 14, 2004, he  
16 loaned the Committee \$100,000, the source of which was reported as the Senator's personal  
17 funds. All told, as of January 14, 2004, Senator Kerry had loaned his Committee a total of  
18 \$6,387,985.80, \$6,287,965 of which he obtained through a bank loan and credit line draws.

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<sup>1</sup> As discussed in Section II.B of this report, the Committee's Schedule C-1s show the \$6.4 million loan as two separate loans received on two separate dates. In the 2003 Year End Report, as amended Schedule C-1 shows a loan from Mellon Trust in the amount of \$2,904,870.35 received on December 24, 2003. Schedule A shows that Senator Kerry loaned the Committee \$1,787,985.80 on that date, and the Schedule C-1s for each of the earlier credit line draws state that these draws were "repaid through proceeds of 12/24/03 loan." Thus, the \$2,904,870 loan amount reported in the Schedule C-1 appears to consist of the \$1,787,985.80 loaned to the Committee and the repayment of the outstanding \$1,100,000 in credit line draws, leaving \$16,884.55 unaccounted for. That amount may be the interest owed on the credit line draws. Schedule C-1 contained in the 2004 February Report shows a \$3.4 million loan from Mellon Trust dated January 5, 2004. The mortgage document, however, recites that Senator Kerry signed a promissory note, dated December 19, 2004, in the amount of \$6.4 million. Attachment 1 at 2.

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1 The loan note and any related loan documents have not been provided, but the publicly  
2 available Mortgage and the Adjustable Rate Rider appended to it show that the \$6.4 million loan  
3 provided for a 3.125% variable interest rate, periodic payments and a due date of January 1,  
4 2034. Attachment 1. News reports also indicated that the loan provided for interest-only  
5 payments for the first ten years of the loan, a fact that appears to be supported by the  
6 Committee's monthly payments of \$16,666.67 to "Mellon Private Mortgage" beginning in  
7 February 2004 for "loan interest" and by language in the Rider.<sup>2</sup>

8 On July 21, 2004, the Committee repaid the loans Senator Kerry had made to it, including  
9 interest and costs.<sup>3</sup>

10 **B. Possible Excessive Contribution from Mrs. Heinz Kerry**

11 Complainant asserts that the value of Senator Kerry's interest in the jointly-owned  
12 collateral property is "at best" \$3.3 million based on a Boston Herald article that noted the City  
13 of Boston Assessing Department had assessed the property for tax purposes at \$6.6 million as of  
14 January 3, 2003. Accordingly, the Complainant maintains that the Committee accepted and  
15 Teresa Heinz Kerry made an unreported and excessive contribution "to the extent that" Mrs.  
16 Heinz Kerry's property rights in the collateral property or other jointly-held property pledged as

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<sup>2</sup> The Washington Post article that reported the interest-only terms of the \$6.4 million loan stated that the Mortgage Bankers Association had calculated the monthly interest payments at a 3.125% rate to be \$16,667, precisely what the Committee began reporting as payments for loan interest in February 2004. See Thomas B. Edsall, *Kerry Lends Campaign \$6.4 Million, House Mortgaged as Funds Dwindle*, The Washington Post, December 24, 2003 at LEXIS, News & Business Database. A provision of the Rider governing how and when the adjustable interest rate would be calculated appears to refer to interest-only payments. It states in pertinent part: "During the first 120 months of this loan, the Note Holder will determine the amount of my new monthly payment that will be sufficient to pay the monthly interest charges on my loan at my new interest rate. Beginning . . . on January 1, 2014, the Note Holder will determine the amount of the monthly payment that would be sufficient to repay the unpaid principal in full on the Maturity Date at my new interest rate in substantially equal payments."

<sup>3</sup> The Committee properly repaid the loans to Senator Kerry prior to July 28, 2004, the date he accepted the Democratic presidential nomination, in accordance with 2 U.S.C. § 441a(j) and 11 C.F.R. § 116.11.

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1 collateral for secured loans received by the Committee exceeds \$2,000, the 2004 limit on  
2 contributions by individuals to authorized committees. Complaint at 1-2.

3 In response, the Committee states that the appropriate measure of the collateral property's  
4 fair market value is its appraised value and appends to its response an Appraisal Report prepared  
5 for Mellon Trust that estimates the fair market value of the property as \$12.8 million as of  
6 November 23, 2003. Committee Response at 2-3. The Committee maintains that the \$6.4  
7 million mortgage placed on the collateral property to secure the loan represents "Senator Kerry's  
8 share of the market value" of the property. Committee Response at 2. Presumably then, the  
9 Committee disputes that Mrs. Heinz Kerry made an excessive contribution since it maintains that  
10 Senator Kerry's interest in the collateral property is equal to the \$6.4 million loan amount.<sup>4</sup>

11 Because he declined to accept public financing, Senator Kerry was permitted to use  
12 unlimited personal funds for his presidential primary campaign, including funds derived from  
13 assets owned jointly with his spouse. *See* 11 C.F.R. § 110.10 and 2 U.S.C. § 431(26). He was  
14 also permitted to obtain a bank loan secured by property jointly-owned with Mrs. Heinz Kerry  
15 without a contribution resulting from her so long as his share of the property is equal to or  
16 exceeds the amount of the loan that is used for the campaign. *See* 11 C.F.R. § 100.52(b)(4). *See*  
17 *also* 11 C.F.R. § 100.33(a) and (c). As the candidate's spouse, Mrs. Heinz Kerry was subject to  
18 the same \$2,000 contribution limit in connection with the primary election as any other  
19 individual and reached that limit when she made a \$2,000 contribution on December 31, 2003.

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<sup>4</sup> The Committee only indirectly addresses what it views as the implicit legal allegations of the complaint. In the main, it asks that the Commission dismiss the complaint, calling it speculative, citing its failure to cite to particular statutory or regulatory provision allegedly violated, and asserting that the Appraisal Report sufficiently refutes the factual allegations in the complaint.

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1 The central question then is whether Senator Kerry's share of the jointly-owned residence was  
2 equal to or greater than \$6.4 million loan amount.

3 **The Fair Market Value of the Collateral Property**

4 The Appraisal Report submitted by the Committee was prepared for Mellon Trust by a  
5 certified appraiser with the intention that it be used "only for collateral analysis and/or portfolio  
6 management." Appraisal Report cover letter dated December 16, 2003. The appraisal estimated  
7 the market value of the collateral property as \$12.8 million as of November 15, 2003, the date the  
8 property was inspected by the appraiser. As noted by the Committee, the Commission has  
9 acknowledged that an appraisal by an expert using an acceptable appraisal method is prima facie  
10 evidence of a property's "usual and normal" market price, a regulatory term it has equated with  
11 the term "fair market value." See Advisory Opinion Advisory 1984-60. Indeed, as a national  
12 bank, Mellon Trust appears to have been required to obtain an appraisal performed by a state  
13 certified appraiser. See 12 C.F.R. § 34.43 (requiring an appraisal to be performed by a State  
14 certified or licensed appraiser except for certain enumerated transactions none of which appear to  
15 be at issue here).

16 Based on our review of the appraisal, we conclude that the appraisal was prepared by an  
17 expert using an acceptable appraisal method and thus constitutes prima facie evidence of the fair  
18 market value of the collateral property. The appraiser who valued the property and prepared the  
19 report appears to have been well-qualified: he is vice president and Director of Valuation and  
20 Consulting Services at a century-old Boston real estate firm; he has been state-certified since  
21 1992 and is certified as a general real estate appraiser, a category of appraiser requiring the most  
22 extensive education and experience; he has extensive experience in valuing properties in  
23 connection with sales, financing acquisition and property tax disputes, including numerous "high

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end” residential properties; and he holds an MAI designation from the Appraisal Institute, a voluntary professional association that issues this designation to members experienced in commercial, industrial and residential real estate valuation who have met fairly rigorous education and experience requirements, including comprehensive examinations beyond those required for state certification. *See* Appraisal Report at 9 and 12 and the Appendix (addressing the appraiser’s qualifications), 264 Mass. Regs. Code tit. 264 § 5.0 (listing licensure and certification requirements) and [www.appraisalinstitute.org/about/designations.asp](http://www.appraisalinstitute.org/about/designations.asp) (concerning MAI requirements). Moreover, the appraiser conducted the appraisal using a sales comparison approach and prepared his report in accordance with the rules of the Uniform Standards of Professional Appraisal Practice (“USPAP”), professional ethics and practice standards that have been adopted by the Massachusetts Board of Registration of Real Estate Appraisers.<sup>5</sup> Mass. Regs. Code tit. 264 § 11.0 (2005) and Appraisal Report at 4.

The fact that the assessed value of the property for property tax purposes diverges from the market value determined by the appraisal is not enough by itself to rebut the prima facie showing that the fair market value of the collateral property as of November 1993 was \$12.8 million. Differences between the appraised and assessed values of property are not uncommon. One news article published just before the complaint was filed noted that a smaller townhouse in the area sold for \$8.55 million in January 2004 and a home on the same street that was being gutted sold for \$5.5 million in late 2003. *See* Glenn Johnson, *Campaign 2004/Kerry Loan*; 3 *Boston Brokers See a Fair Appraisal*, The Boston Globe, February 24, 2004 at A20, available at

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<sup>5</sup> The comparables used by the appraiser include condominiums and property sales dating back three years from the date of the valuation, which at first blush raise concerns about whether these are truly comparable to the collateral property, a townhouse. However, the inclusion of larger condominiums and earlier sales appears to result from the appraiser’s determination that the comparable market is the high-end luxury market in Boston’s Back Bay and Beacon Hill neighborhoods, a relatively small geographic area, a judgment that appears to be reasonable.

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1 LEXIS, News & Business Database. Those sales figures are, respectively, 69% and 24% more  
2 than the 2004 assessed values of those properties. *See also* Thomas Keane, Jr., *Tax Break Hits*  
3 *Close to all Boston Homes* (op-ed), the Boston Herald, March 3, 20004 *available at* LEXIS,  
4 News & Business database (based on the author's random sample of 40 residential sales in  
5 Boston since January 2004, on average, the sales price exceeded the assessed value by 37%).  
6 Although the disparity between the appraised value and assessed value of the collateral property  
7 is larger than those examples, three real brokers consulted in connection with the appraisal  
8 opined that the Kerry residence would sell for between \$13 million and \$15 million. Appraisal  
9 Report at 64. *See also* Glenn Johnson, *Campaign 2004* (three high-end Boston real estate  
10 brokers said the appraised value of the collateral property set an aggressive but not unreasonable  
11 value).

12 Given the generally persuasive nature of the Appraisal Report and the fact that an  
13 extensive inquiry into that Report would likely turn on technical concepts of real property  
14 appraisal, we conclude that the preponderance of the currently available information supports  
15 relying upon the Appraisal Report as establishing the fair market value of the collateral property  
16 as \$12.8 million.

17 **Senator Kerry's Share of the Collateral Property**

18 In light of the \$12.8 million appraised value of the residence, Senator Kerry's share of the  
19 collateral property is considered to be 50% or \$6.4 million based on the representation that he  
20 and Mrs. Heinz Kerry are joint beneficial owners of the property as tenants by the entirety.  
21 Massachusetts law provides that a husband and wife are equally entitled to the control,  
22 management and possession of property held by them as tenants by the entirety. Massachusetts  
23 General Laws ch. 209, § 1. Each spouse holds a unitary title to the collateral property in which

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1 the interests of each extend to the whole and each has an “indestructible right of survivorship,  
2 and the estate remains inseverable and not subject to voluntary partition.” *Coraccio v. Lowell*  
3 *Five Cents Savings Bank*, 612 N.E.2d 650, 654 (Mass. 1993). Although Massachusetts permits  
4 either spouse to convey or encumber his or her individual interest in property held as tenants by  
5 the entirety without the consent of the other spouse, a lender acquires only the debtor spouse’s  
6 interest in the property subject to the survivorship interest of the non-debtor spouse which  
7 terminates should the debtor spouse predecease the non-debtor spouse. *Id.* See also *In re:*  
8 *Snyder*, 249 B.R. 40, 44 (B.A.P. 1<sup>st</sup> Cir.)(2000). In addition, for tenancies by the entireties  
9 created after February 11, 1980, the interest of a debtor spouse is not subject to seizure or  
10 execution by a creditor of that spouse as long as the property is the principal residence of the  
11 non-debtor spouse. Mass. Gen. Laws ch. 209, § 1 (2004).<sup>6</sup>

12 Given the limitations on each spouse’s ability to control the property, Senator Kerry  
13 cannot be said to have legal right of access to or control over the full value of the property. See  
14 11 C.F.R. § 100.3(a)(“‘Personal funds’ means . . . amounts derived from any asset that, under  
15 applicable State law . . . the candidate had legal right of access to or control over . . .”). Rather,  
16 Senator Kerry’s share of the property is considered to be 50% of the property value for purposes  
17 of the FECA. See 11 C.F.R. § 100.33(c)(personal funds of a candidate include one-half the value  
18 of property jointly-owned with a spouse unless the instrument of conveyance reflects otherwise)  
19 and Advisory Opinion 1991-10 (permitting a candidate who held property in Massachusetts as

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<sup>6</sup> Public Records reflect that the Senator and Mrs. Heinz Kerry acquired the property in 1995 so this statutory provision applies

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tenants by the entirety to consider one half of the equity in the property as his personal funds).<sup>7</sup>

Even though Senator Kerry's interest in the property on its face is equal to the loan amount, a review of publicly available mortgage documents raises the possibility that there may have been a senior lien on the property. The appraisal transmittal letter calls special attention to the "Additional Assumptions and Limiting Conditions" which reads, "I have not considered the effect upon value of any mortgage on the subject property." On-line searches of the Suffolk County Registry of Deeds database reflected two other senior liens on the residence that had not been discharged as of the appraisal valuation date. The first lien was an October 1996 mortgage in favor of Citizen's Bank. A discharge of that \$820,000 mortgage was filed on December 23, 2003 although it is dated December 12, 2003. Searches of the database revealed no discharge of a second lien against the property, also in favor of Citizen's Bank. The second lien is a September 9, 1999 open-end mortgage in favor of Citizen's Bank that secures a \$450,000 home equity credit line issued to Senator Kerry. Attachment 2. This mortgage may have secured the \$350,000 credit line draw reported as one of the earlier December loans Senator Kerry made to his Committee. *See supra*, p. 3.

The non-discharged Citizen's Bank mortgage lien raises a concern as to whether Senator Kerry encumbered the collateral property in an amount greater than the \$6.4 million appraised value of his share of the property. According to the December 19, 2003 mortgage document, the Mellon Trust loan was dated December 19, 2003, which suggests that Senator Kerry received one

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<sup>7</sup> The Committee's response indicates that Senator Kerry's share of the property is 50% in stating that the \$6.4 million mortgage represents Senator Kerry's share of the appraised value of the collateral property. *See* Committee response at 2. It is unclear at this point whether that conclusion is based on Senator Kerry's share of the beneficial interest under the Trust or whether it is a legal conclusion based on the joint ownership of the property as tenants by the entirety.

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1 loan of \$6.4 million on that date. However, the Schedule C-1s filed by the Committee report the  
2 Mellon Trust Loan as two loans totaling \$6,304,870: (1) a \$2,904,870.35 loan on December 24,  
3 2003 for which part of the proceeds were used to pay off the three smaller loans Senator Kerry  
4 made to the Committee earlier in December, including the \$350,000 credit draw on a Citizen's  
5 Bank home equity credit line that was apparently secured by the collateral property, and \$3.4  
6 million loan on January 5, 2004. If Senator Kerry obtained a single loan of \$6.4 million as  
7 recited in the mortgage and used part of the proceeds on December 24, 2003 to pay off an earlier  
8 loan secured by the same property, then the unencumbered equity in the collateral property was  
9 less than \$6.4 million when he received the Mellon Trust loan on December 19, thereby  
10 triggering an excessive contribution by Mrs. Heinz Kerry, albeit for a short duration.<sup>8</sup>  
11 Moreover, any subsequent draws against the Citizen's Bank home equity credit line would have  
12 also resulted in a senior lien affecting the value of Senator's Kerry's equity in the collateral  
13 property since, under the terms of an open-end mortgage, future advances are secured by that  
14 mortgage and have the same priority as if the advance was made on the date the open-end  
15 mortgage was recorded. *See* Mass. Gen. Laws ch. 183, § 28B (2004) and Attachment 2 at 2.

16 The existence of a senior lien in conjunction with a \$6.4 million loan, both secured by the  
17 same property, raises the possibility that Senator Kerry encumbered the collateral property in an  
18 amount greater than his \$6.4 million interest in the collateral property, resulting in a possible  
19 excessive contribution by Teresa Heinz Kerry, the beneficial co-owner of the property.  
20 Therefore, we recommend that the Commission find reason to believe that Teresa Heinz Kerry  
21 may have made and the Committee may have accepted an excessive contribution in violation of 2

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<sup>8</sup> If Senator Kerry received the \$6.4 million Mellon Trust loan as two loans on the dates reported in the Schedule C-1s, then he may not have encumbered his share of the property for more than \$6.4 million at any one time

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1 U.S.C. §§ 441a(a)(1)(A) and 441a(f), respectively. We also recommend that the Commission  
2 find reason to believe that the Committee violated 2 U.S.C.  
3 § 434(b) for failing to report the excessive contribution.

4 **C. Possible Prohibited Contribution**  
5

6 The Committee's reports and publicly- available property records raise an issue as to  
7 whether the Mellon Trust N.A., a national bank, made the \$6.4 million bank loan to Kerry within  
8 the ordinary course of business. If not, both the Bank and the Committee may have violated 2  
9 U.S.C. § 441b since national banks are prohibited from making contributions in connection with  
10 election to any political office and political committees are prohibited from accepting them. *See*  
11 2 U.S.C. § 441b.

12 The Act exempts from the definition of contribution bank loans made in accordance with  
13 applicable law and in the ordinary course of business. 2 U.S.C. § 431(8)(B)(vii). A loan is  
14 deemed to be made in the ordinary course of business when it meets the following conditions:  
15 1) it bears the usual and customary interest rate of the lending institution for the category of the  
16 loan involved; 2) it is made on the basis that it assures repayment; 3) it is evidenced by a written  
17 instrument; and 4) it is subject to a due date or amortization schedule. 11 C.F.R. § 100.82(a).

18 Of particular concern is whether the loan was made on a basis that assures repayment.  
19 Commission regulations provide that a loan is made on a basis that assures repayment if the  
20 lending institution making the loan has a perfected security interest in collateral owned by the  
21 candidate receiving the loan, the fair market value of the collateral is equal to or greater than the  
22 loan amount and any senior liens as determined on the date of the loan, and the candidate  
23 provides documentation of the perfected security interest. 11 C.F.R. § 100.82(e)(1)(i). The  
24 Committee's reports and public property records raise a question as to whether the value of the

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1 collateral was equal to or greater than the loan amount and any senior liens when the loan was  
2 made. Additionally, the application of Massachusetts law governing tenants by the entirety raises  
3 an issue as to whether the bank had a perfected security interest in the collateral property  
4 sufficient to ensure that it made the loan on a basis that assured repayment.

5 Whether the value of the collateral property was greater than or equal to the loan amount  
6 depends on whether the collateral was the entire residence or only Senator Kerry's share of the  
7 property. Assuming that the collateral for the loan is the entire residence, the \$12.8 million fair  
8 market value of the residence as estimated by the appraisal greatly exceeds the amount of Mellon  
9 Trust's loan, even in light of a possible senior lien arising from the \$450,000 Citizen's Bank  
10 home equity credit line. However, the value of the collateral securing the Mellon Trust loan is  
11 reported on Schedule C-1 as \$6.4 million raising the possibility that the collateral securing the  
12 loan may be limited to Senator Kerry's interest in the property. If the bank's collateral was  
13 somehow limited in the underlying loan documents, then the fair market value of the bank's  
14 collateral may have been less than the amount of the loan and the senior lien.

15 A second concern is whether, in light of Massachusetts law, the bank has a perfected  
16 security interest in the collateral sufficient to ensure that the loan was made on a basis that  
17 assured repayment. As discussed *supra*, despite the unitary nature of a tenancy by the entireties,  
18 Massachusetts permits either spouse to convey or encumber his or her individual interest in  
19 property held as tenants by the entirety without the consent of the other, resulting in the creditor  
20 acquiring the debtor spouse's interest subject to the nondebtor spouse's survivorship rights and  
21 statutory right to continue living in the property if it is the principal residence. If that was the  
22 case here, Mellon Trust's ability to assure repayment would have been significantly undermined.

23 The current factual record suggests that Mrs. Heinz Kerry may have agreed to encumber

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1 the property by consenting to the mortgage. The Heinz Kerry response states that Mrs. Heinz  
2 Kerry signed a "written acknowledgment" that the Trust could allow a mortgage to be placed on  
3 the property "as required by the terms of the loan to Senator Kerry." Heinz Kerry Response. A  
4 Trustee's Certificate filed with the Mellon Trust mortgage certifies that the trustee has the  
5 "complete authority to enter into a mortgage . . . encumbering the property . . ." and that "all the  
6 beneficiaries . . . have accordingly authorized and instructed" the trustee to execute the  
7 mortgage. Attachment 3. We have no information whether both were signatories to the loan,  
8 however, so it is unclear whether Mrs. Heinz Kerry can be considered a non-debtor spouse for  
9 purposes of Mass. Gen. Laws, ch. 209, §1. If not, then Mellon Trust's interest would still  
10 presumably be subject to Mrs. Heinz Kerry's statutory right to continue to live in the property,  
11 assuming it is her principal residence.

12 The Committee reports and responses to the complaint suggest that the loan was solely  
13 Senator Kerry's obligation. The responses of both the Committee and Mrs. Heinz Kerry refer to  
14 the loan as the Senator's loan and the mortgage as one the Senator obtained. See Committee  
15 response at 1 and 2 ("In December 2003, Senator Kerry took out a mortgage"; "on December 19,  
16 2003, Senator Kerry obtained a \$6.4 million mortgage loan") and Mrs. Heinz Kerry response  
17 ("This complaint addresses a mortgage loan taken out by Senator Kerry"); ("Mrs. Heinz Kerry  
18 [signed a document] as required by the terms of the loan taken out by her husband"). These  
19 references may not have intended to imply that Senator Kerry was solely liable for the loan, but  
20 read in view of the Scheduled C-1 valuation of the collateral as \$6.4 million, Senator Kerry's half  
21 of the property and the absence of a reported co-endorser, this point needs to be clarified through  
22 a review of the loan documents.

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As for the other regulatory factors relevant to determining whether or not the loan was made in the ordinary course of business, information contained in the responses, the Committee's reports and public records indicate that the loan was evidenced by a written instrument and was subject to a due date. However, the available information does not permit us to determine conclusively that the \$6.4 million loan bore Mellon Trust's usual and customary rate of interest for this type of loan. The 3.125% variable interest rate coupled with the apparent 10-year interest-only payment requirement strike us as quite favorable when compared to the interest rates on the earlier December loans Senator Kerry made to the Committee that originated from draws on lines of credit at Mellon Bank and Citizen's Bank. The \$500,000 draw on the Mellon Bank credit line bore a 5.5% variable interest rate and the \$350,000 draw on the Citizen's Bank credit line bore a 3.5% variable interest rate. The interest rate and interest-only terms may well be usual and customary for the level and type of loan made by Mellon Trust to Senator Kerry. Given that we will be seeking information concerning the Mellon loan as discussed above, we believe the prudent course is also to seek information about whether the interest rate was customary for this type of loan.

In order to determine whether Mellon Trust's \$6.4 million loan to Senator Kerry was made on a basis that assured repayment, this Office recommends that the Commission find reason to believe that the Committee and Mellon Trust violated 2 U.S.C. § 441b.

**D. Reporting Violations Relating to the Loan**

Finally, the Committee apparently misreported the date the Mellon Trust Loan was incurred on Schedule C-1. In addition, the circumstances under which the loan was obtained raise questions as to whether the Committee's receipt of the loan proceeds was properly reported.

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1 Based on public news reports, Senator Kerry obtained the loan for use in connection with  
2 his campaign. *See e.g.*, Thomas B. Edsall, *Kerry Lends Campaign \$6.4 million, supra* (stating  
3 that Kerry announced he obtained a \$6.4 million loan to lend his campaign money); Patrick  
4 Healy, *Kerry Mortgage to Help Fund Race, supra* (stating that the candidate was seeking a  
5 mortgage on his home for campaign expenses). A candidate who receives a loan for use in  
6 connection with his campaign receives it as an agent of his authorized committee. 2 U.S.C.  
7 § 432(e)(2).

8 The Mellon Trust mortgage indicates that the underlying loan was dated December 19,  
9 2003. The Schedule C-1s contained in the Committee's reports, however, report the loan as if it  
10 were two separate loans received on two different dates as discussed in Section II.B. It may be  
11 that Senator Kerry received the loan proceeds in installments, executed two promissory notes  
12 rather than one, or that he intended to use only some of the proceeds of the loan to finance his  
13 campaign. If not, and the entire loan was indeed obtained for use in connection with his  
14 campaign as the campaign publicly announced, then the Senator received the funds as an agent of  
15 the Committee and receipt of the entire loan amount should have been reported at the time he  
16 received it, in the January 2003 Year End Report. *See* 2 U.S.C. § 432(e)(2); 11 C.F.R. §§  
17 101.2(a) and 102.8(a).

18 On the other hand, based on the Committee's reports, it appears that Senator Kerry did  
19 not loan his committee about \$95,130 of the loan proceeds, suggesting that the entire loan was  
20 not for use in connection with his election. In that case, it was appropriate for the Committee to  
21 report on Schedule C-1 the actual amount of the loan proceeds received in a particular reporting  
22 period rather than the total amount of the \$6.4 million loan. In either case, though, the

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1 Committee should have reported December 19, 2003 as the date the loan was incurred on  
2 Schedule C-1. *See* 11 C.F.R. § 104.3(d)(4) and instructions for FEC Form 3P at 13-14.

3 Finally, if it turns out that the collateral for the \$6.4 million loan was the entire residence,  
4 and if Mrs. Heinz Kerry also signed the loan, then the Committee misreported on Schedule C-1  
5 the value of the collateral as only Senator Kerry's share of the property and failed to indicate that  
6 the loan had another endorser.

7 Based on the foregoing, we recommend that the Commission find reason to believe that  
8 the Committee violated 2 U.S.C. § 434(b) and 11 C.F.R. § 104.3(d)(4).

9 **II. III. INVESTIGATION**

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IV. RECOMMENDATIONS

1. Find reason to believe that John Kerry for President, Inc. and Robert Farmer, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(f), 441b, and 434(b) and 11 C.F.R. § 104.3(d)(4).
2. Find reason to believe that Teresa Heinz Kerry violated 2 U.S.C. § 441a(a)(1)(A).
3. Find reason to believe that Mellon Trust of New England, N.A. violated 2 U.S.C. § 441b.
4. Approve the attached Factual and Legal Analyses.
- 5.
6. Approve the appropriate letters.

Date

5/6/05

James A. Kahl

Deputy General Counsel

Rhonda J. Vosdingh

Associate General Counsel for Enforcement

Sidney Rooke

Assistant General Counsel

Dawn Odrowski  
Attorney

by DR

## Attachments

1. December 19, 2003 Mortgage and Adjustable Rate Rider
2. August 23, 1999 Citizen's Bank Open-End Mortgage
3. Trustee's Certificate dated December 18, 2003
4. Factual & Legal Analyses (3)

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Return To:

MELLON TRUST OF NEW ENGLAND, N.A. <sup>SUFFOLK REGISTRY</sup>  
 ATTN: POST-CLOSING DEPT.  
 ONE BOSTON PLACE 024-0093  
 BOSTON, MA 02108

LOS #: 70498  
 MLS #: 0000000

2003 DEC 23 AM 9:35

Prepared By:

STEFANIA HOLLAND  
 MELLON TRUST OF NEW ENGLAND, N.A.  
 ONE BOSTON PLACE  
 BOSTON, MASSACHUSETTS 02108

*Stefania M. Holland*  
 REGISTER OF DEEDS



12/23/2003 Doc: 0092

(Space Above This Line For Recording Data)

## MORTGAGE

## DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated **DECEMBER 19TH, 2003** together with all Riders to this document.

(B) "Borrower" is **THE T & J LOUISBURG SQUARE NOMINEE TRUST**

Borrower is the mortgagor under this Security Instrument.

(C) "Lender" is **MELLON TRUST OF NEW ENGLAND, N.A.**

Lender is a **NATIONAL ASSOCIATION**  
 organized and existing under the laws of **MASSACHUSETTS**

MASSACHUSETTS - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT Form 3022 1/01

- 6(MA) (0005)

Page 1 of 15

Initials: *MA LKS*

VMP MORTGAGE FORMS - (800)521-7291



B322

ATTACHMENT 1Page 1 of 1

26044131417  
 Property Address: 19 Louisburg Square, Boston, MA

Lender's address is **ONE BOSTON PLACE, BOSTON, MASSACHUSETTS 02108**

Lender is the mortgagee under this Security Instrument.

(D) "Note" means the promissory note signed by Borrower and dated **DECEMBER 19TH, 2003**

The Note states that Borrower owes Lender **SIX MILLION FOUR HUNDRED THOUSAND AND 00/100** Dollars

(U.S. \$ **6,400,000.00** ) plus interest Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than **JANUARY 1ST, 2034**

(E) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

(F) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(G) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower (check box as applicable):

- |   |   |  |
|---|---|--|
| <input checked="" type="checkbox"/> Adjustable Rate Rider | <input type="checkbox"/> Condominium Rider              | <input type="checkbox"/> Second Home Rider                               |
| <input type="checkbox"/> Balloon Rider                    | <input type="checkbox"/> Planned Unit Development Rider | <input type="checkbox"/> 1-4 Family Rider                                |
| <input type="checkbox"/> VA Rider                         | <input type="checkbox"/> Biweekly Payment Rider         | <input checked="" type="checkbox"/> Other(s) (specify) <b>SCHEDULE A</b> |

(H) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(I) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(J) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(K) "Escrow Items" means those items that are described in Section 3.

(L) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(M) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(N) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(O) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

*[Handwritten initials]*  
**CKS**

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(P) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

# TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to Lender and Lender's successors and assigns, with power of sale, the following described property located in the **COUNTY** [Type of Recording Jurisdiction] of **SUFFOLK** [Name of Recording Jurisdiction]

**SEE SCHEDULE A ATTACHED**

Parcel ID Number:  
**19 LOUISBURG SQUARE**  
**BOSTON**  
("Property Address"):

which currently has the address of  
[Street]  
[City], Massachusetts **02108** [Zip Code]

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

**BORROWER COVENANTS** that Borrower is lawfully seised of the estate hereby conveyed and has the right to mortgage, grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

**THIS SECURITY INSTRUMENT** combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

**UNIFORM COVENANTS.** Borrower and Lender covenant and agree as follows:

1. **Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges.** Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security

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Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

**2. Application of Payments or Proceeds.** Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

**3. Funds for Escrow Items.** Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item.

Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

**4. Charges; Liens.** Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in

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a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

**5. Property Insurance.** Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and

restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. **Occupancy.** Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. **Preservation, Maintenance and Protection of the Property; Inspections.** Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. **Borrower's Loan Application.** Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or

*[Handwritten initials]*  
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with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. **Protection of Lender's Interest in the Property and Rights Under this Security Instrument.** If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. **Mortgage Insurance.** If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for

Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until the Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair

market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

**12. Borrower Not Released; Forbearance By Lender Not a Waiver.** Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

**13. Joint and Several Liability; Co-signers; Successors and Assigns Bound.** Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

**14. Loan Charges.** Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the

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charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit, and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. **Notices.** All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. **Governing Law; Severability; Rules of Construction.** This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa, and (c) the word "may" gives sole discretion without any obligation to take any action.

17. **Borrower's Copy.** Borrower shall be given one copy of the Note and of this Security Instrument.

18. **Transfer of the Property or a Beneficial Interest in Borrower.** As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument.

If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. **Borrower's Right to Reinstate After Acceleration.** If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. **Sale of Note; Change of Loan Servicer; Notice of Grievance.** The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. **Hazardous Substances.** As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances. gasoline, kerosene, other flammable or toxic petroleum

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products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials, (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

**NON-UNIFORM COVENANTS.** Borrower and Lender further covenant and agree as follows:

22. **Acceleration; Remedies.** Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the **STATUTORY POWER OF SALE** and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the **STATUTORY POWER OF SALE**, Lender shall mail a copy of a notice of sale to Borrower, and to other persons prescribed by Applicable Law, in the manner provided by Applicable Law. Lender shall publish the notice of sale, and the Property shall be sold in the manner prescribed by Applicable Law. Lender or its



designee may purchase the Property at any sale. The proceeds of the sale shall be applied in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

23. Release. Upon payment of all sums secured by this Security Instrument, Lender shall discharge this Security Instrument. Borrower shall pay any recordation costs. Lender may charge Borrower a fee for releasing this Security Instrument, but only if the fee is paid to a third party for services rendered and the charging of the fee is permitted under Applicable Law.

24. Waivers. Borrower waives all rights of homestead exemption in the Property and relinquishes all rights of curtesy and dower in the Property.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Witnesses:

Linda K Smith (Seal)

LINDA K. SMITH, CO-TRUSTEE OF THE T&J LOUISBURG SQUARE NOMINEE TRUST

Robert Haas (Seal)

MELLON BANK, NA BY ROBERT HAAS, VICE PRESIDENT  
CO-TRUSTEE OF THE T&J LOUISBURG SQUARE NOMINEE TRUST

(Seal)

-Borrower

(Seal)

-Borrower

(Seal)

-Borrower

(Seal)

-Borrower

(Seal)

-Borrower

(Seal)

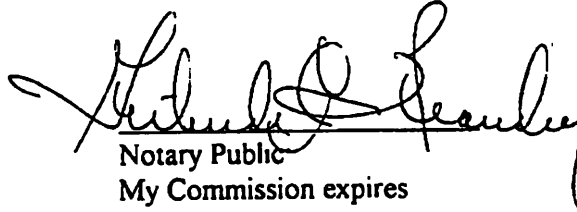
-Borrower

## COMMONWEALTH OF PENNSYLVANIA

Allegheny, ss

December 18th, 2003

Then personally appeared Robert Haas the above named Vice President of MELLON BANK, N A., which in its capacity as Trustee under the Declaration acknowledges the foregoing instrument to be his free act and deed, before me,

  
Notary Public  
My Commission expires

Notarial Seal  
Gertrude C. Beaudry, Notary Public  
Bradford Woods Boro. Allegheny County  
My Commission Expires July 9, 2005  
Member, Pennsylvania Association of Notaries

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State of Illinois *aa*  
 COMMONWEALTH OF MASSACHUSETTS

County ss:

On this 19<sup>th</sup> day of December

, before me personally appeared

Linda K. Smith

to me known to be the person(s) described in and who executed the foregoing instrument, and acknowledged that he/she/they executed the same as his/her/their free act and deed.

My Commission Expires: 05-07-07



*Isaac Alvarez*  
 Notary Public

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LOS #: 70498  
MLS #: 000000000**ADJUSTABLE RATE RIDER**

THIS ADJUSTABLE RATE RIDER is made on DECEMBER 19TH, 2003, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust or Security Deed (the "Security Instrument") of the same date given by the undersigned (the "Borrower") to secure Borrower's Adjustable Rate Note (the "Note") to MELLON TRUST OF NEW ENGLAND, N.A. (the "Lender") of the same date and covering the property described in the Security Instrument and located at

19 LOUISBURG SQUARE, BOSTON, MA 02108

[Property Address]

THE NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN THE INTEREST RATE AND THE MONTHLY PAYMENT. THE NOTE LIMITS THE MAXIMUM RATE THE BORROWER MUST PAY.

ADDITIONAL COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

**A. INTEREST RATE AND MONTHLY PAYMENT CHANGES**

The Note provides for an initial interest rate of 3.125 %. The Note provides for changes in the interest rate and the monthly payments, as follows:

**4. INTEREST RATE AND MONTHLY PAYMENT CHANGES****(A) Change Dates**

The interest rate I will pay may change on FEBRUARY 1ST, 2004 and on the first day of each month thereafter. Each date on which my interest rate could change is called a "Change Date."

**(B) The Index**

Beginning with the first Change Date, my interest rate will be based on an index. The "Index" is the One Month London Interbank Offered Rate (LIBOR) as published daily in the "Money Rates" Section of The Wall Street Journal as the British Bankers' Association average of interbank offered rates for dollar deposits in the London market based on quotations at 16 major banks. The most recently published rate in effect in The Wall Street Journal on the day before each Change Date is called the "Current Index".

If the Index is no longer available, the Note Holder will choose a new index which is based upon comparable information. The index may not be reported in The Wall Street Journal or any other newspaper, but will be an index about which public information is readily available. The Note Holder will give me notice of this choice.

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**(C) Calculation of Changes**

Before each Change Date, the Note Holder will calculate my new interest rate by adding TWO percentage points (2.000 %) ("Margin") to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D) below, this rounded amount will be my new interest rate until the next Change Date. In the event that the sum of the Current Index and Margin for any adjustment period is one-sixteenth (1/16th) more or less than the nearest one-eighth (1/8th) of one percent, my interest rate for that adjustment period will be rounded to the next highest one-eighth (1/8th) of one percent.

During the first 120 months of this loan, the Note Holder will determine the amount of my new monthly payment that will be sufficient to pay the monthly interest charges on my loan at my new interest rate. Beginning with the Change Date on JANUARY 1ST, 2014, the Note Holder will determine the amount of the monthly payment that would be sufficient to repay the unpaid principal in full on the Maturity Date at my new interest rate in substantially equal payments.

**(D) Limits on Interest Rate Changes**

On the first Change Date there will be no limit on the amount of the adjustment except for the Maximum or Minimum Rates; at each Change Date thereafter, my adjustable rate of interest will never be increased or decreased by more than THE ~~percentage points~~ Maximum or Minimum rate limitations. The "Maximum Rate" is 10.750 %; the "Minimum Rate" is 3.000 %.

**(E) Effective Date of Changes**

My new interest rate will become effective on each Change Date. I will pay the amount of my new monthly payment beginning on the first monthly payment date after the Change Date until the amount of my monthly payment changes again.

**(F) Notice of Changes**

The Note Holder will deliver or mail to me a notice of any changes in my interest rate or the amount of my monthly payment not less than twenty five (25) calendar days before the payment at the new interest rate or amount is due. The notice will include information required by law to be given me along with the title and telephone number of a person who will answer any question I may have regarding the notice.

**12. UNIFORM SECURED NOTE**

(A) Until I exercise my Conversion Option under the conditions stated in Section 5 of the Adjustable Rate Note, Uniform Covenant 17 of the Security Instrument is amended to read as follows:

**Transfer of the Property or a Beneficial Interest in Borrower.** If all or any part of the Property or any interest in it is sold or transferred (or if a beneficial interest in Borrower is sold or transferred and Borrower is not a natural person) without the Note Holder's prior written consent, the Note Holder may, at its option, require immediate payment in full of all sums secured by the Security Instrument. However, this option shall not be exercised by the Note Holder if exercise is prohibited by federal law as of the date of the Security Instrument. The Note Holder also shall not exercise this option if: (a) I cause to be submitted to the Note Holder information required by the Note Holder to

evaluate the intended transferee as if a new loan were being made to the transferee; and (b) the Note Holder reasonably determines that the Note Holder's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in the Security Instrument is acceptable to the Note Holder.

To the extent permitted by applicable law, the Note Holder may charge a reasonable fee as a condition to the Note Holder's consent to the loan assumption. The Note Holder may also require the transferee to sign an assumption agreement that is acceptable to the Note Holder and that obligates the transferee to keep all the promises and agreements made in the Note and in the Security Instrument. I will continue to be obligated under the Note and the Security Instrument unless the Note Holder releases me in writing.

If the Note Holder exercises the option to require immediate payment in full, the Note Holder shall give me notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is delivered or mailed within which I must pay all sums secured by the Security Instrument. If I fail to pay these sums prior to the expiration of this period, the Note Holder may invoke any remedies permitted by the Security Instrument without further notice or demand on me.

(B) If I exercise my Conversion Option under the conditions stated in Section 5 of the Adjustable Rate Note, Uniform Covenant 17 of the Security Instrument described in Section 12(A) above shall cease to apply to the Property securing this Note and the following shall apply instead.

**Transfer of the Property or a Beneficial Interest in Borrower.** If all or any part of the Property or any interest in it is sold or transferred (or if a beneficial interest in Borrower is sold or transferred and Borrower is not a natural person) without the Note Holder's prior written consent, Note Holder may, at its option, require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by the Note Holder if exercise is prohibited by federal law as of the date of the Security Instrument.

If the Note Holder exercises this option to require immediate payment in full, the Note Holder shall give me notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is delivered or mailed within which I must pay all sums secured by the Security Instrument. If I fail to pay these sums prior to the expiration of this period, the Note Holder may invoke any remedies permitted by the Security Instrument without further notice or demand on me.

BY SIGNING BELOW, BORROWER accepts and agrees to the terms and covenants contained in this Adjustable Rate Rider.

<u>Linda K. Smith</u> (SEAL)	<u>Robert Haas</u> (SEAL)
LINDA K. SMITH, CO-TRUSTEE OF THE T&J LOUISBURG SQUARE NOMINEE TRUST	Borrower MELLON BANK, NA BY ROBERT HAAS, VICE PRESIDENT Borrower
<u>Linda K. Smith</u> (SEAL)	<u>Linda K. Smith</u> (SEAL)
Borrower	Borrower

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## Exhibit "A"

19 Louisburg Square  
Legal Description

A certain parcel of land situated in the Beacon Hill Section of the City of Boston, Suffolk County, Massachusetts, and being more particularly described as follows:

Beginning at the corner of Pinckney Street and Louisburg Square, thence

N08-30-00E a distance of seventy-six and forty-five hundredths (76.45') feet by said Pinckney Street to a point, thence

N86-36-00E a distance of twenty-eight and twenty-two hundredths (28.22') feet to a point, thence

S03-27-28E a distance of twenty-one and eighty-eight hundredths (21.88') feet by 17 Louisburg Square to a point, thence

S86-33-27W a distance of one and thirty-four hundredths (1.34') feet by said 17 Louisburg Square to a point, thence

By a curve to the left with a radius of eight and two hundredths ( $R = 8.02'$ ) feet and a length of twelve and six hundredths ( $L = 12.06'$ ) feet by said 17 Louisburg Square to a point, thence

S00-22-03W a distance of forty-seven and forty-one hundredths (47.41') feet by said 17 Louisburg Square to a point, thence

S90-00-00W a distance of thirty-one and sixty-one hundredths (31.61') feet by Louisburg Square to the point of beginning.

Said parcel contains a 2,198 square feet and is shown as 19 Louisburg Square on a plan entitled "Resubdivision Plan of Land, Louisburg Square, Boston, MA. Prepared for the Abbey Group, Prepared by Andover Engineering, Inc., 1383 Washington Street, Newton, MA, February 10, 1994, Scale 1" = 10'."

For mortgagors' title see Deed recorded in Book 19549, Page 213.

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CITIZENS BANK

SUFFOLK REGISTRY OF DEEDS  
REC'D ENTD & EXAM ATTEST

1999 SEP -8 AM 9:18

OPEN-END MORTGAGE  
Home Equity Credit Line
*Paul R. Timony*  
 REGISTER OF DEEDS
THIS MORTGAGE (the "Security Instrument") is DATED 08/23/1999

The mortgagor(s) is/are

 LINDA K. SMITH, TRUSTEE OF THE T & J LOUISBURG SQUARE  
 NOMINEE TRUST  
 MELLON BANK, N.A., TRUSTEE OF THE T & J LOUISBURG SQUARE  
 NOMINEE TRUST

(the "Mortgagor") This Security Instrument is granted to the Mortgagee  
 Citizens Bank of Massachusetts  
 a savings bank organized under the laws of the state where the Lender has its principal place of business,  
 28 State Street, Boston, MA 02109 ("Lender")

This Security Instrument secures to the Lender (i) the repayment of the debt evidenced by a Home Equity Credit Line  
 Agreement made in favor of the Lender by

JOHN F. KERRY

and dated as of 08/23/1999 (the "Agreement"), including but not limited to, any future advances,  
 with interest thereon, made to the maker(s) of the Agreement by the Lender under Paragraph 1 below, (ii) all  
 renewals, extensions and modifications of the Agreement, (iii) the payment of all other sums, with interest, advanced  
 under Paragraph 9 below to protect the security of this Security Instrument, and (iv) the performance of the  
 covenants and agreements under this Security Instrument and the Agreement.

The Agreement is an adjustable rate consumer revolving loan agreement, pursuant to which the Lender has agreed  
 to lend money to the Mortgagor from time to time pursuant to an open-end credit plan as defined in Section 1 of  
 Chapter 140D of the Massachusetts General Laws

The maximum amount secured by this Security Instrument is \$ 450,000.00 of principal, plus interest thereon  
 and all other charges and fees imposed by the Lender under the Agreement and this Security Instrument, including,  
 but not limited to, amounts disbursed by the Lender under Paragraph 9 below

For this purpose, the Mortgagor, in consideration of the debt evidenced by the Agreement, does hereby mortgage,  
 grant and convey to the Lender and the Lender's successors and assigns, with STATUTORY POWER OF SALE  
 AND MORTGAGE COVENANTS, the following described property located in the County of SUFFOLK

Commonwealth of Massachusetts

"See attached legal description hereto and made a part hereof."

which has the address of 19 LOUISBURG SQUARE, BOSTON, MA 02108

(the "Property Address").

TOGETHER with all the improvements now or hereafter erected on the property described above, and all  
 easements, rights, appurtenances, fixtures and rents now or hereafter a part of or related to the property described  
 above, all of which shall be deemed to be and remain a part of such property. All replacements and additions shall  
 also be covered by this Security Instrument. All of the foregoing shall be referred to in this Security Instrument as the  
 "Property"

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THE MORTGAGOR COVENANTS that the Mortgagor is lawfully seized of the estate hereby conveyed and has the right to mortgage, grant and convey the Property, and that the Property is unencumbered, except for encumbrances expressly permitted by this Security Instrument. The Mortgagor warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances expressly permitted by this Security Instrument.

The Mortgagor and the Lender covenant and agree as follows

1. **Open-End Mortgage.** This Security Instrument is an open-end mortgage and the Lender shall have all the rights, powers and protections to which the holder of any open-end mortgage is entitled, including, without limitation, all rights, powers and protections under Section 28B of Chapter 183 of the Massachusetts General Laws. The makers of the Agreement may borrow, repay and re-borrow such amounts as desired, subject to the terms and conditions of the Agreement. The amounts which the Mortgagor borrows and re-borrows under the Agreement shall be referred to in this Security Instrument as "Future Advances"

The Mortgagor agrees that each Future Advance shall be secured by and have priority under this Security Instrument as if such Future Advance were made as of the date this Security Instrument was recorded

At no time shall the principal amount of the debt secured by this Security Instrument exceed the maximum principal amount of the Agreement, nor shall the maturity of Future Advances secured by this Security Instrument extend beyond the maturity date of the Agreement. All Future Advances shall be recorded on the books and records of the Lender

2. **Future Advances Benefit Mortgagor Even if Mortgagor is Not Also a Maker of the Agreement.** If a Mortgagor is not also a maker of the Agreement, such Mortgagor further agrees that (i) each Future Advance shall be considered as an advance for the benefit of such Mortgagor, and (ii) such Mortgagor shall be liable for the debt evidenced thereby, as if such Mortgagor had signed the Agreement; provided, however, that the extent of such Mortgagor's liability for such debt shall be limited to such Mortgagor's interest in the Property, including, but not limited to, any rents, policies of hazard insurance maintained on the Property and any proceeds thereof, and any award of damages on account of any condemnation for public use of or injury to the Property. With respect to such Mortgagor only, the Lender agrees to look solely to the Property and such rents, policies, proceeds and condemnation awards in satisfaction of the debt secured hereby

The Lender and any other Mortgagor or maker(s) of the Agreement may agree to extend, modify, forbear or make any other accommodations with regard to the terms of this Security Instrument or the Agreement without such Mortgagor's consent and without releasing such Mortgagor or modifying this Security Instrument as to such Mortgagor's interest in the Property

3. **Payment of Principal and Interest.** The Mortgagor shall promptly pay when due the principal of and the interest on the debt evidenced by the Agreement, and all other fees and charges as provided in the Agreement, and the principal of and interest on any Future Advances secured by this Security Instrument. This Security Instrument secures payment of the Agreement according to its terms which are incorporated by reference into this Security Instrument.

4. **Application of Payments.** Unless applicable law requires otherwise, all payments received by the Lender under this Security Instrument and the Agreement may be applied to reduce amounts owing to the Lender from the Mortgagor and from the maker(s) of the Agreement in whatever order the Lender, in its sole discretion, chooses

5. **Variable Rate.** The Agreement provides for changes in the rate of finance charge, as more particularly described in the Agreement. All references to interest in this Security Instrument shall be to the variable rate of finance charge set forth in the Agreement

6. **Prior Mortgages and Deeds of Trust, Charges, Liens.** The following provisions concerning existing indebtedness ("the Senior Mortgage") are a part of this Mortgage. The lien of this Mortgage securing the indebtedness may be secondary and inferior to an existing lien. Grantor expressly covenants and agrees to pay, or see to the payment of, the Senior Mortgage and to prevent any default on such Senior Mortgage, any default under the instruments evidencing such indebtedness, or any default under any security documents for such indebtedness

The Mortgagor shall not modify, amend or extend the Senior Mortgage or the debt secured thereby without the written consent of the Lender. The Mortgagor shall pay or cause to be paid all taxes, assessments, and other charges, fines, and impositions attributable to the Property which may attain a priority over this Security Instrument and leasehold payments or ground rents, if any

The Mortgagor shall not allow any lien or encumbrance to attach to the Property, other than the lien for unpaid real estate taxes not yet due and payable (the "Accrued Taxes") and the Senior Mortgage. Without limiting the scope of the foregoing, the Mortgagor shall promptly discharge any lien, other than the Accrued Taxes and Senior Mortgage, which has priority over this Security Instrument unless the Mortgagor (i) in good faith contests the lien by, or defends against enforcement of the lien in, legal proceedings which, in the Lender's opinion, operate to prevent the enforcement of the lien or forfeiture of any part of the Property and (ii) deposits with the Lender money or other security acceptable to the Lender to satisfy the amount of such lien. If the Lender determines that any part of the Property is subject to a lien prohibited under this Security Instrument, the Lender may give the Mortgagor a notice identifying the lien, and the Mortgagor shall satisfy the lien or take one or more of the actions described above within ten (10) days of the giving of notice

7. **Hazard or Property Insurance.** The Mortgagor shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage", and such other hazards as the Lender may require, including without limitation flood insurance. The insurance shall be maintained in such amounts and for such periods as the Lender may require. Without limiting the foregoing, this insurance shall be maintained in an amount no less than the maximum principal amount of the Agreement plus all amounts secured by mortgages which have priority over this Security Instrument unless the replacement value of the Property is less than this sum, in which case this insurance shall be for the full replacement value of the Property

Where appropriate, the Lender may require the Mortgagor to maintain insurance against rent loss in addition to the insurance described above.

The insurance carrier providing the insurance shall be chosen by the Mortgagor subject to the Lender's approval which shall not be unreasonably withheld. All insurance policies and renewals shall be in form and content acceptable to the Lender, with such maximum deductible clauses as the Lender may require and shall include a standard mortgagee clause in favor of and in a form acceptable to the Lender. The Lender shall have the right to hold the policies and renewals, subject to the terms of the Senior Mortgage.

All insurance policies and renewals shall provide that they may not be cancelled or diminished without ten (10) days prior written notice to the Lender and not contain any disclaimer of the insurer's liability for failure to give such notice. If the Lender requires, the Mortgagor shall promptly give to the Lender all receipts of paid premiums and renewal notices. In the event of loss, the Mortgagor shall give prompt notice to the insurance carrier and the Lender. The Lender may make proof of loss if not made promptly by the Mortgagor.

Unless the Lender and the Mortgagor otherwise agree in writing or unless otherwise required under the terms of any prior mortgage of record, casualty insurance proceeds shall be applied to restoration or repair of the Property damaged, if the restoration or repair is economically feasible and the Lender's security is not lessened. If the restoration or repair is not economically feasible, the Lender's security would be lessened, the insurance proceeds shall be applied to the reduction of the indebtedness of the sums secured by this Security Instrument, whether or not then due, with any excess paid to the Mortgagor.

If the Mortgagor abandons the Property, or does not answer within thirty (30) days, a notice from the Lender that the insurance carrier has offered to settle a claim of insurance benefits, then the Lender may collect and apply the insurance proceeds. The Lender may use the proceeds to repair or restore the Property or to pay sums secured by this Security Instrument, whether or not then due. The thirty (30) day period will begin when the Lender sends the notice to the Mortgagor.

Unless the Lender and the Mortgagor otherwise agree in writing, any application of proceeds to principal shall not extend or postpone the due date of the monthly payments referred to in Paragraph 3 above or change the amount of the payments. If, under Paragraph 19 below, the Property is acquired by the Lender, the Mortgagor's right to any insurance policies and proceeds resulting from damage to the Property prior to the acquisition shall pass to the Lender to the extent of the sums secured by this Security Instrument immediately prior to the acquisition.

8. Preservation, Maintenance and Protection of Property, Mortgagor's Loan Application, Leaseholds. The Mortgagor shall keep the Property in good repair and shall not destroy, damage or impair the Property, allow the Property to deteriorate, or commit waste or permit any nuisance on the Property. The Mortgagor shall be in default if any forfeiture action or proceeding, whether civil or criminal, is begun that in Lender's good faith judgment could result in forfeiture of the Property or otherwise materially impair the lien created by this Security Instrument or the Lender's security interest.

The Mortgagor shall also be in default if the Mortgagor, during the loan application process, gave materially false or inaccurate information or statements to the Lender (or failed to provide the Lender with any material information) in connection with the loan evidenced by the Agreement.

The Mortgagor shall comply with all the provisions of any lease if this Security Instrument is on a leasehold. If the Mortgagor acquires fee title to the Property, the leasehold and the fee title shall not merge unless the Lender agrees to the merger in writing.

9. Protection of Lender's Rights in the Property Mortgage Insurance. If the Mortgagor fails to perform the covenants and agreements contained in this Security Instrument promptly, or if there is a legal or administrative proceeding that, in the judgment of the Lender, may significantly affect the Lender's rights in the Property (such as a proceeding in bankruptcy, probate, for condemnation or to enforce laws or regulations), then the Lender may do or pay for whatever the Lender determines is necessary to protect the value of the Property and the Lender's rights in the Property. The Lender's actions may include paying reasonable attorneys' fees and entering (or causing its agent or independent contractor to enter) on the Property to make repairs. Although the Lender may take action under this Paragraph 9, the Lender does not have to do so.

Any amounts disbursed by the Lender under this Paragraph 9 shall become additional debt of the Mortgagor secured by this Security Instrument. Unless the Mortgagor and the Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the variable rate of interest applicable to the Agreement, and shall be payable with interest, upon notice from the Lender to the Mortgagor requesting payment. Any such action by Lender shall not be construed as curing the default so as to bar Lender from any remedy that it otherwise would have had.

If the Lender required mortgage insurance as a condition of making the loan secured by this Security Instrument, the Mortgagor shall pay the premiums required to maintain the mortgage insurance in effect until such time as the requirement for the mortgage insurance terminates in accordance with the Mortgagor's and the Lender's written agreement or applicable law.

10. Inspection. The Lender or its agent or independent contractor may make reasonable entries upon and inspections of the Property. The Lender shall give the Mortgagor notice at the time of or prior to an inspection specifying reasonable cause for the inspection.

11. Condemnation. The proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation or other taking of part or all of the Property, or for conveyance in lieu of condemnation, are hereby assigned and shall be paid to the Lender subject to the terms of the Senior Mortgage and any other mortgage, deed of trust or other security agreement with a lien which has priority over this Security Instrument.

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In the event of a total taking of the Property subject to the terms of the Senior Mortgage the proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with any excess paid to the Mortgagor. In the event of a partial taking of the Property, unless the Mortgagor and the Lender agree in writing or otherwise required under the terms of Senior Mortgage, the proceeds shall at the option of the Lender be applied toward the amounts secured hereby in such order as the Lender may determine or toward the repair, rebuilding or restoration of the Property upon such conditions as the Lender may require, or toward both of such purposes.

If the Property is abandoned by the Mortgagor, or if, after notice by the Lender to the Mortgagor that the condemnor offers to make an award or settle a claim for damages, the Mortgagor fails to respond to the Lender within thirty (30) days after the date the notice is given the Lender is authorized, subject to the terms of the Senior Mortgage, to collect and apply the proceeds, at its option, either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due

Unless the Lender and the Mortgagor otherwise agree in writing any application of proceeds to principal shall not extend or postpone the due date of the monthly payments referred to in Paragraph 3 above or change the amount of such payments

12. **Mortgagor Not Released; Forbearance by Lender Not a Waiver.** Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by the Lender to any maker(s) of the Agreement or to any successors in interest of the Mortgagor or of any such maker shall not operate to release the liability of the original Mortgagor or Mortgagor's successors in interest. The Lender shall not be required to (i) begin proceedings against any maker(s) of the Agreement or successors in interest of the Mortgagor or of any maker(s) of the Agreement, (ii) refuse to extend time for payment, or (iii) otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original maker(s) of the Agreement or the Mortgagor or any successor in interest of the Mortgagor or of such maker. The Lender's forbearance in exercising any right or remedy shall not be a waiver of or preclude the exercise of any such right or remedy.

13. **Successors and Assigns Bound; Joint and Several Liability.** The covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of the Lender and the Mortgagor, subject to the provisions of Paragraph 17 below. The Mortgagor's covenants and agreements shall be joint and several.

14. **Notices.** Any notice to the Mortgagor provided for in this Security Instrument shall be given by delivering it or by mailing it by first class mail unless applicable law requires use of another method. The notice shall be directed to the Property Address or any other address which the Mortgagor designates by written notice to the Lender. Any notice to the Lender shall be given by first class mail to Lender's address stated herein, or to any other address which the Lender designates by notice to the Mortgagor. Any notice provided for in this Security Instrument shall be deemed to have been given to the Mortgagor or the Lender when delivered or two (2) business days following mailing as provided in this Paragraph 14.

15. **Governing Law; Severability.** This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. In the event that any provision or clause of this Security Instrument or the Agreement conflicts with applicable law such conflict shall not affect other provisions of this Security Instrument or the Agreement which can be given effect without the conflicting provision. To this end, the provisions of this Security Instrument and the Agreement are declared to be severable.

16. **Mortgagor's Copy.** The Mortgagor shall be given one copy of the Agreement and of this Security Instrument.

17. **Transfer of the Property of a Beneficial Interest in the Mortgagor; Assumption.** If the Mortgagor sells or transfers all or any part of the Property or any interest in the Property, (or if a beneficial interest in the Mortgagor is sold or transferred and the Mortgagor is not a natural person) without the Lender's prior written consent, the Lender will terminate the Lender's commitment to make Future Advances and require immediate repayment in full of all sums secured by this Security Instrument, unless prohibited by applicable law. If Lender requires immediate payment in full under this paragraph, Lender will give mortgagor at least (30) days to make the required payment. The 30-day period will begin on the date the notice is mailed or delivered. If the mortgagor does not make the required payment during that period, Lender may act to enforce its rights under this Security Instrument without giving Mortgagor any further notice of demand for payment. Your rights under the Agreement belong to you only and may not be transferred or assigned. Your obligations, however, are binding on your heirs and legal representatives.

18. **Optional Reinstatement of Security Instrument by Lender.** Notwithstanding the Lender's acceleration of the sums secured by this Security Instrument the Lender may, in its sole discretion, discontinue any proceedings begun by the Lender to enforce this Security Instrument at any time prior to entry of a judgment enforcing this Security Instrument if: (i) the Mortgagor pays the Lender all sums which would be then due under this Security Instrument and the Agreement, had no acceleration occurred, (ii) the Mortgagor cures all breaches of any other covenants or agreements of the Mortgagor contained in this Security Instrument and in the Agreement, (iii) the Mortgagor pays all reasonable expenses incurred by the Lender in enforcing the covenants and agreements of the Mortgagor contained in this Security Instrument and in enforcing the Lender's remedies as provided in Paragraph 19 below, including, but not limited to, reasonable attorneys' fees, (iv) the Mortgagor, at the sole option of the Lender, executes a Mortgage Agreement and Deed Modification Agreement which will adjust the rate of interest on the Agreement and will provide such other terms and conditions as the Lender shall specify, including, but not limited to, a termination of the rights of the Maker(s) of the Agreement to Future Advances, and (v) the Mortgagor takes such actions as the Lender may require to assure that the lien of this Security Instrument, the Lender's interest in the Property and the Mortgagor's obligation to pay the sums secured by this Security Instrument shall continue unimpaired. In the event that the Lender allows the Mortgagor to make such payments and cure this Security Instrument, this Security Instrument as modified and the obligations secured hereby shall remain in full force and effect as if no acceleration had occurred. Nothing in this Paragraph 18 shall be deemed to require the Lender to allow the Mortgagor to cure this Security Instrument or otherwise discontinue any proceedings begun by the Lender to enforce this Security Instrument.

**19. Acceleration; Remedies.** To the full extent permitted by law, upon a breach by the Mortgagor of any covenant in or condition of this Security Instrument or the Agreement or of any instrument executed in connection with this Security Instrument or the Agreement, or upon a breach by the Mortgagor of the Statutory Condition, the Lender may (i) require immediate payment in full of all sums secured by this Security Instrument without demand or notice, except as expressly prohibited by applicable law, and/or (ii) invoke the STATUTORY POWER OF SALE and any other remedies permitted by applicable law. The Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Paragraph 19, including but not limited to, reasonable attorneys' fees, costs of title evidence, abstracts and title reports.

If the Lender invokes the STATUTORY POWER OF SALE, the Lender shall mail a copy of a notice of sale to the Mortgagor, and to other persons prescribed by applicable law, in the manner provided by applicable law. The Lender shall publish the notice of sale, and the Property shall be sold in the manner prescribed by applicable law. The Lender or its designees may purchase the Property at any sale and/or sell the Property in one or more parcels, as the Lender, in its sole discretion, deems appropriate. The proceeds of the sale shall be applied in the following order: (i) to all expenses of the sale, including, but not limited to, reasonable attorneys' fees, (ii) to all sums secured by this Security Instrument; and (iii) any excess to the person or persons legally entitled to it.

**20. Assignment of Rents.** The Mortgagor unconditionally assigns and transfers to the Lender all the rents and revenues of the Property. The Mortgagor authorizes the Lender or the Lender's agents and/or independent contractors to collect the rents and revenues and hereby directs each tenant of the Property to pay the rents to the Lender or the Lender's agents and/or independent contractors. However, prior to the Lender's notice to the Mortgagor of the Mortgagor's breach of any covenant or agreement in this Security Instrument, the Mortgagor shall collect and receive all rents and revenues of the Property. This assignment of rents constitutes an absolute assignment and not an assignment for additional security only.

If the Lender gives notice of breach to the Mortgagor: (i) all rents received by the Mortgagor shall be held by the Mortgagor as trustee for the benefit of the Lender only, to be applied to the sums secured by the Security Instrument, (ii) the Lender shall be entitled to collect and receive all of the rents of the Property, and (iii) each tenant of the Property shall pay all rents due and unpaid to the Lender or the Lender's agent on the Lender's written demand to the tenant.

The Mortgagor has not executed any prior assignment of the rents except in favor of the holder of the Senior Mortgage, and has not and will not perform any act that would prevent the Lender from exercising its rights under this Paragraph 20.

The Lender shall not be required to enter upon, take control of or maintain the Property before or after giving notice of breach to the Mortgagor. However, the Lender or a judicially appointed receiver may do so at any time there is a breach. Any application of rents shall not cure or waive any default or invalidate any other right or remedy of the Lender. This assignment of rents of the Property shall terminate when the debt secured by this Security Instrument is paid in full.

**21. Hazardous Substances.** The Mortgagor shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances on or in the Property. The Mortgagor shall not do, or allow anyone else to do, anything affecting the Property that is in violation of any Environmental Law. The preceding two sentences shall not apply to the lawful presence, use or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property.

The Mortgagor shall give the Lender prompt written notice of any investigation, claim, demand, lawsuit or other action by any governmental regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which the Mortgagor has actual knowledge. If the Mortgagor learns, or is notified by any governmental or regulatory authority that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, the Mortgagor shall promptly take all necessary actions in accordance with applicable environmental law.

As used in this Paragraph 21, "Hazardous Substances" are those substances defined as toxic or hazardous substances by environmental law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials. As used in this Paragraph 21, "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection.

**22. Loan Charges.** If the Agreement is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Agreement exceed the permitted limits, then: (i) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (ii) any sums already collected from Mortgagor which exceeded permitted limits will be refunded to Mortgagor. The Lender may choose to make this refund by reducing the principal owed under the Agreement or by making a direct payment to Mortgagor. If a refund reduces principal, the reduction will be treated as a partial prepayment under the Agreement.

**23. Legislation.** If enactment or expiration of applicable laws has the effect of rendering any provision of the Agreement or this Security Instrument unenforceable according to its terms, the Lender, at its option may (i) terminate its commitment to make Future Advances, (ii) require immediate payment in full of all sums secured by this Security Instrument, and/or (iii) invoke any remedies permitted by Paragraph 19 unless expressly prohibited by applicable law.

**24. Release.** Upon termination and discharge of the Agreement and all other sums secured by this Security Instrument, this Security Instrument shall become null and void and the Lender shall release this Security Instrument without charge to the Mortgagor. The Mortgagor shall pay any recordation costs.

**25. Waivers.** The Mortgagor waives all rights of homestead exemption in the Property and all rights of curtesy and dower in the Property.

26. Condominium and Planned Unit Development Provisions. In the event the Property is a unit or units of a condominium or a planned unit development, the Mortgagor hereby covenants and agrees to the following as additional conditions of this Security Instrument.

(a) The Mortgagor shall promptly pay the Mortgagor's share of common expenses and all assessments as required by the Constituent Documents as the same become due and payable, and shall fully and faithfully keep and perform each and every covenant, agreement, and provision in such Constituent Documents. As used herein, the term "Constituent Documents" shall mean the master deed or declaration establishing the condominium or planned unit development, the documents establishing the governing body of such condominium or planned unit development (the "Association") or any by-laws, rules, regulations, or resolutions adopted pursuant to either thereof.

(b) If there is in force a master insurance policy insuring the Property against loss from fire and other hazards customarily included in extended coverage insurance in an amount sufficient to provide the full replacement cost coverage of the Property (exclusive of land) in such amounts and for such periods as the Lender may require, such insurance (together with such casualty insurance on the contents of the units as the Lender may require) shall satisfy the Mortgagor's obligations to the Lender under Paragraph 7 above relating to hazard or property insurance, unless the Lender requires the Mortgagor to maintain additional insurance. The Lender shall be entitled to require the Mortgagor to maintain such additional insurance if the Lender determines that the Mortgagor's percentage interest in the proceeds of such a master policy inadequately protects the Lender's interest or if for any other reason the Lender deems such additional insurance appropriate. In the event of a casualty loss to or taking of the condominium or planned unit development or to any of the units therein:

(i) The Mortgagor shall immediately notify the Lender of such loss or taking.

(ii) The Lender may elect to vote under the terms of and as provided in the Constituent Documents in place and stead of the Mortgagor with respect to all matters of repair and restoration of the same, and with respect to the disposition of the insurance proceeds or condemnation proceeds, and the Mortgagor hereby irrevocably appoints the Lender as the Mortgagor's attorney-in-fact so to vote which appointment as attorney in fact is coupled with the Lender's interest in the Property.

(iii) The Mortgagor will make all advances as required by the Association for repair and restoration due to inadequacy of insurance proceeds or taking proceeds, provided that it has been voted to proceed with such repair and restoration.

(iv) The Mortgagor assigns to the Lender its right to receive any insurance proceeds or other funds payable as a result of damage or condemnation and not applied to a restoration and agrees to pay to the Lender any such funds received by the Lender which are received by the Mortgagor.

(v) The Mortgagor shall take such actions as may be reasonably necessary to insure that the Association maintains public liability insurance in amounts and such forms as are acceptable to the Lender.

(c) The Mortgagor shall promptly deliver to the Lender a true and full copy of each and every notice of default received by the Mortgagor with respect to any obligation of the Mortgagor under the Constituent Documents.

(d) The Mortgagor shall not vote for or consent to any modification of or amendment to, or relaxation in the enforcement of any provision of the Constituent Documents, without the prior written consent of the Lender. The Mortgagor shall not vote to petition or subdivide the condominium or planned unit development or vote to (i) abandon or terminate the condominium or planned unit development, (ii) terminate professional management of the condominium or the planned unit development, or (iii) take action which would render the insurance coverages maintained by the Association unacceptable to the Lender without, in each case, the prior written consent of the Lender.

27. Default. You will be in default under the Agreement if any of the following occurs, each of which constitutes a breach of a material obligation of yours under the Agreement:

(a) You fail to make any payment when due or to pay any charge or fee when due.

(b) Your action or failure to act adversely affects our security for your loan or a right we have in the security (an attempt by any other creditor to take money or other property of yours that is in our possession is an example of a failure to act that would adversely affect our security or security interest).

(c) A court determines that you are bankrupt or insolvent, or

(d) You gave or gave us false or materially misleading information in connection with any extension of credit to you under your loan.

28. Results of Default. If you are in default, we may lower your credit limit, we may refuse to make any further advances under the Agreement, we may refuse to pay any outstanding checks that would require us to make an additional loan to you, we may foreclose on the real property described in this Mortgage securing your loan, we may take whatever other action is permitted under this Mortgage, and we may exercise any and all of our rights with respect to any other property securing your loan. We also may demand that you pay the full amount you owe on your loan immediately. After default, we may assess interest at the increased rate of 2 percent per month on the outstanding principal balance of your loan until all amounts due are paid in full.

24190 268

REQUEST FOR NOTICE OF DEFAULT AND FORECLOSURE  
UNDER SUPERIOR MORTGAGES OR DEEDS OF TRUST

The Mortgagor and the Lender request the holder of any mortgage deed of trust or other encumbrance with a lien which has priority over this Security Instrument to give notice to the Lender, at the Lender's address as stated herein of any default under the superior encumbrance and of any sale or other foreclosure action

BY SIGNING BELOW, the Mortgagor accepts and agrees to the terms and covenants contained in this Security Instrument and in any rider(s) executed by the Mortgagor and recorded with it

Linda K Smith 8-27-99

LINDA K. SMITH, TRUSTEE OF THE T & J LOUISBURG SQUARE  
NOMINEE TRUST

WBS 8-31-99  
MELLOW BANK, N.A., TRUSTEE OF THE T & J LOUISBURG SQUARE  
NOMINEE TRUST

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26044131443

## INDIVIDUAL ACKNOWLEDGMENT

STATE OR COMMONWEALTH OF Wisconsin )  
 COUNTY OF Rock )  
 On the 27<sup>th</sup> day of August, 1999 before me appeared

LINDA K. SMITH, TRUSTEE OF THE T & J LOUISBURG  
 SQUARE NOMINEE TRUST

to me personally known to be the person(s) whose name(s) is/are subscribed to this instrument, and such person(s) acknowledged that he/she/they (i) executed the same for the purposes therein contained, and (ii) executed this instrument as their free act and deed

IN WITNESS WHEREOF, I hereunto set my hand and official seal

(Official Seal)

Judith A. Hardy  
 Notary Public  
 My Commission expires July 2, 2000

## INDIVIDUAL ACKNOWLEDGMENT

STATE OR COMMONWEALTH OF Pennsylvania )  
 COUNTY OF Allegheny )  
 On the 31<sup>st</sup> day of August, 1999 before me appeared

William B. Oats, First Vice President of  
 MELLON BANK, N.A., TRUSTEE OF THE T & J LOUISBURG  
 SQUARE NOMINEE TRUST

to me personally known to be the person(s) whose name(s) is/are subscribed to this instrument, and such person(s) acknowledged that he/she/they (i) executed the same for the purposes therein contained, and (ii) executed this instrument as their free act and deed

IN WITNESS WHEREOF, I hereunto set my hand and official seal

(Official Seal)

William B. Oats  
 Notary Public  
 My Commission expires

Notarial Seal  
 Tamara Swank, Notary Public  
 Pittsburgh, Allegheny County  
 My Commission Expires Nov. 10 2001  
 Member, Pennsylvania Association of Notaries

Attention Registry of Deeds/Town or City Clerk

Mail to:

Citizens Bank Consumer Finance Operations  
 1 Citizens Drive  
 Riverside, RI 02915

## SCHEDULE "A"

The land with the buildings thereon located in Boston, Suffolk County, Massachusetts, on Louisburg Square, shown as No 19 Louisburg Square on a plan entitled "Resubdivision Plan of Land, Louisburg Square Boston, MA" prepared by Andover Engineering, Inc., 1383 Washington Street, Newton, MA, dated February 10, 1994 recorded with the Suffolk County Registry of Deeds in Book 19058, Page 23 (the "Plan"), consisting of 2,198 square feet according to said plan. See deed recorded in Book 19549, Page 213 for a more particular description of this property.

Subject to and with the benefit of all easements, restrictions, conditions, provisions, rights, rights of way, covenants, orders, takings, agreements, and reservations of record, and as set forth in deeds, insofar as the same may be in force and applicable and as set forth in the following instruments recorded with Suffolk Deeds dated: (a) September 6, 1826 in Book 312, Page 217; (b) July 8, 1944 in Book 563, Page 1; (c) February 1, 1944 in Book 6089, Page 121 and 123 as amended; (d) February 1, 1944 in Book 6100, Page 193 as amended; (e) August 21, 1946 in Book 6308, Page 402, 404; (f) December 6, 1990 in Book 16622, Page 20; (g) March 6, 1992 in Book 17345, Page 51; and (h) May 9, 1994 in Book 19058, Page 43, all so far as now in force and applicable.

Subject to and with the benefit of assignment of all rights, title and interest under covenants and agreements recorded in Book 6089, Page 123 and Book 6100, Page 193.

So much of the land above described is included within the limits of said Louisburg Square, is subject to the rights of all persons lawfully entitled thereto in and over the same, and there is appurtenant to the land above described the right to use said way in common with others lawfully entitled thereto, subject to restrictions, easements, covenants, agreements, and conditions of record so far as now in force and applicable.

For mortgagors title see deed recorded on January 11, 1995, in Book 19549, Page 213, at the Suffolk County Registry of Deeds.

SMITH, Linda K. and  
MFI I ON BANK N A, TRUSTEES OF  
: & : LOUISBURG SQUARE NOMINEE TRUST (recorded 1/11/95 in Book 19549, Page 202)





12/23/2003 Doc: 0091

TRUSTEE'S CERTIFICATE

The undersigned, Linda K Smith and Mellon Bank, N A , Trustees of The T&J Louisburg Square Nominee Trust u/d/t dated January 10, 1995 (the "Trust") and recorded with the Suffolk County Registry of Deeds on January 11, 1995 in Book 19549, Page 202, hereby certify as follows

- 1 The undersigned are the sole Trustees of said Trust,
- 2 That the Trust has not been altered, amended, revoked, or terminated, but remains in full force and effect;
- 3 That pursuant to said Trust, the Trustees has the full right, power and authority to sell, convey, assign or mortgage or otherwise dispose of all or any part of the Premises
4. As trustees of said Trust, the undersigned certify that they have full and complete authority to enter into a mortgage in the amount of \$6,400,000 00 encumbering the property known as No. 19 Louisburg Square, Boston, Massachusetts,
5. The undersigned hereby certifies that all Beneficiaries of the Trust , have accordingly authorized and instructed the undersigned to execute the said documentation as described within Paragraph 4 herein; and
6. No Beneficiary is a minor or incapacitated, and
- 7 This Trustee Certificate may be executed in more that one counterpart, with the effect that all of the executed counterparts shall have the effect of being a single document.

SUFFOLK COUNTY  
REGISTER OF DEEDS  
2003 DEC 23 AM 9:35  
JANUARY 11 1995  
RECORDED

50  
Bh

Return To:

PAUL J. LITWIN, ESQ.  
SHAMES & LITWIN  
10 St. James Avenue, 11th Flr.  
Boston, MA 02116

ATTACHMENT 3  
Page 1 of 1

26044131446

Subscribed and sworn to under the penalties of perjury this 18<sup>th</sup> day of December, 2003

THE T&J LOUISBURG SQUARE NOMINEE TRUST

By Linda K Smith  
Linda K. Smith, Trustee under the Declaration  
of Trust dated January 10, 1995 for The T&J  
Louisburg Square Nominee Trust (the "Declaration")  
and not individually

MELLON BANK, N A , Trustee as aforesaid and not  
and not individually

By Robert Haas  
Robert Haas, Vice President

COMMONWEALTH OF PENNSYLVANIA

Allegheny, ss

December 18, 2003

Then personally appeared Robert Haas the above named Vice President of MELLON BANK, N A., which in its capacity as Trustee under the Declaration acknowledges the foregoing instrument to be his free act and deed, before me,

Gertrude C. Beaudry  
Notary Public  
My Commission expires

Notarial Seal  
Gertrude C. Beaudry, Notary Public  
Bradford Woods Boro. Allegheny County  
My Commission Expires July 9, 2005  
Member Pennsylvania Association of Notaries

*Illinois*  
STATE OF ~~NEW YORK~~

\_\_\_\_\_, SS

December 1, 2003

Then personally appeared the above named Linda K Smith, as Trustee as aforesaid, and acknowledges the foregoing instrument to be her free act and deed, before me,



Notary Public Isaac Alvarez  
My Commission expires 05-07-07

TCERT:Mellon